Fixed Narrowband Market Review and Network Charge Control: Call for inputs

Everything Everywhere Response

Non-confidential version

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1 Introduction and summary

This document provides Everything Everywhere Limited's (EE) response to the document "Fixed Narrowband Market Review and Network Charge Control: Call for Inputs" (the Call for Inputs).[1] EE expects that it will provide further detail on its views through the remainder of this market review process as more detailed information becomes available and this response simply identifies the key areas from EE's perspective which need to be covered by this market review. In the time available, EE has focused on such areas relating to the scope and basic principles which should be taken into account in this market review. EE expects to provide more detailed comments in response to later consultations in this process on any issues which arise in relation to specific proposals on other areas as appropriate.

The current arrangements (Network Charge Control) expire in September 2013 and the Call for Inputs itself provides little detail about the process for conducting the current market review to ensure appropriate new arrangements are in place by that date. The Call for Inputs only makes reference to a January 2013 consultation. In relation to the timescales for this review, however, further detail was provided in the "Call for inputs workshop" held on 3 May 2012 with UKCTA representatives (the UKCTA Presentation). The timeline shared at that presentation suggested, in addition, that there would be a cost modelling consultation and workshops in the autumn. EE notes that, depending on the approach taken, this could be a very significant piece of work and urges Ofcom to provide further detail on its proposed approach as soon as possible. This will not only enable Communications Providers (CPs) to understand the resource commitments which will be required to engage in this process (and plan accordingly) but also ensure that the proposed timings are feasible. Ofcom needs to ensure that the delays which have led to significant practical difficulties arising around the Business Connectivity Market Review are not repeated here.

The focus of this response is on the wholesale markets which are covered by this market review process. EE notes that the call for inputs sets out the relevant retail markets which were considered to be overall competitive in the previous market review process and that Ofcom does not envisage the need for a revision of this previous conclusion. In the UKCTA Presentation Ofcom went further than the call for inputs itself on this issue.[2] The UKCTA Presentation explicitly raised the issue of the extent to which fixed-mobile substitution is relevant in this regard. EE considers that, while there is some interaction between them, the retail fixed and mobile markets remain separate markets. Notwithstanding this, Ofcom still needs to ensure that its proposals in the Fixed Narrowband Market Review are technology neutral as between fixed to mobile and mobile to fixed calls.

This response therefore focuses on a key number of specific wholesale issues. EE's views in summary are as follows.[3]

- **Call origination:** the availability of wholesale call origination from BT underpins a significant element of competition in narrowband markets and BT still has SMP in relation to the provision of these inputs. EE therefore considers that it is still a appropriate and proportionate remedy to retain charge control SMP conditions and SMP conditions to require the provision of Carrier pre-selection/indirect access products. (Section 2 of this response.)
- **Call termination:** EE considers that fixed termination rates should be set at pure LRIC both on account of the EC Recommendation on call termination rates and to ensure technology neutrality vis a vis mobile termination rates which are currently charge controlled on this

[1] Published 17 May 2012

[2] See the slides given at this presentation "Narrowband Market Review: Call for Inputs Workshop", 3 May 2012, especially slides 11 and 12.

[3] These bullets provide EE's answer to consultation questions 1 and 2.

basis. Notwithstanding this EE continues to believe that LRIC+ is the right cost benchmark. There is no material change which means that call termination regulation needs to remain. Deriving pure LRIC fixed costs is potentially a very significant cost modelling exercise and EE is concerned that Ofcom may have under estimated the work involved in its current project planning for this process. The detail of estimating such cost benchmarks and identifying how common costs should alternatively be recovered is likely to raise significant issues. Ofcom needs to be extremely careful about increasing other regulated rates to allow such common cost recovery. If pure LRIC rates are applied then clearly a rapid reduction to those levels is preferable. (Section 3 of this response.)

- **Non geographic call termination:** EE is disappointed that Ofcom has not raised the issue of including non-geographic call termination in the relevant wholesale call termination markets and considers that there is no reason why this should not be done. At the very least Ofcom must take the opportunity of this market review to consider this issue under the Common Regulatory Framework (CRF). (Section 3 of this response.)
- **Other issues:** section 5 of this response sets out EE's views on a number of other issues raised by the Call for Inputs including in relation to Single Transit and notification periods (where we support the UKCTA response to the Call for Inputs) and the need for interim arrangements if the NTS call origination SMP obligation is not renewed on account of any new arrangements for non-geographic call services on which Ofcom is also currently consulting.

Many of these points cut across the individual consultation questions identified in the Call for Inputs. This response therefore discusses the issues under headings relating to the main issues from EE's perspective. Where specific parts of the response relate to specific consultation questions this is identified in relevant footnotes.

2 Call origination markets and pricing remedies

The Call for Inputs notes that indirect constraints on BT's market power with respect to call origination from mobile, voice over IP (VoIP) and LLU based competition have increased over the course of the current charge control period. What is also apparent from the figures which Ofcom has included in the Call for Inputs is that PSTN fixed calls remain a vitally important form of communication.

The availability of wholesale fixed call origination underlies a significant element of the competition in the fixed retail market and is required to ensure that the current degree of retail competition can be maintained. EE considers that the concentration in these retail markets has been creeping up in recent years. BT is still in a commanding position in relation to wholesale inputs and is the only provider able to give a national service to downstream competitors. Given that retail competition is generally on a national basis, this means that downstream competitors must purchase from BT and this gives BT a particular advantage in the wholesale market over any other potential provider. Dealing with multiple wholesale providers remains an untested and risky prospect for any downstream competitor. Therefore, at least for the duration of the next charge control period, EE considers it would be premature to remove the SMP status of BT in wholesale call origination or to remove the charge controls on it for these products. EE considers that there is no evidence that the **prospect** of competition in the **wholesale** market has been established to the requisite standard to justify any other conclusion. Given that the current degree of retail competition relies on such wholesale inputs, Ofcom needs to be sure that there is a competitive wholesale market available before removing regulation. The extent of any indirect constraints, **in the absence of such wholesale regulation**, is not clear.[4]

[4] This provides EE's answer to consultation questions 7 to 10.

In this context, therefore, EE's view is that a charge control of call origination remains a necessary and proportionate remedy. The alternatives cited in the Call for Inputs all would require significant additional detail and justification before they could be considered credible. Currently EE considers that it is unlikely that these alternatives will be able to be shown to be appropriate. Given the above, it should be clear that reliance on *ex post* remedies (such as competition law) will not be sufficient to protect existing competition in a reasonable timescale. A safeguard cap similarly means that any competition reliant on wholesale call origination will not be protected by cost based charge controls which ensure that the relationship between retail and wholesale prices is both economically efficient and pro-competitive. A safeguard cap would still enable wholesale prices to creep above cost based rates to a certain extent, which would place competitors reliant on those wholesale charges at a disadvantage in the markets in which they compete. A cost orientation remedy in principle could have a similar effect to a charge control, but this all depends on the exact nature of the cost orientation required. Without further detail it is not possible to state a view categorically on this.[5] However, if a cost orientation remedy is sufficiently strong to protect competition adequately it is likely to be very similar in practice to a charge control. Charge controls have historically provided all parties with a greater degree of certainty, giving a basis on which to invest and compete. Therefore, on the basis of current information EE considers that BT should continue to be found to have SMP here and be subject to a charge control.[6]

3 Fixed termination rates and markets

As EE has argued previously[7], the current arrangements whereby mobile call termination is regulated on the basis of pure LRIC, while fixed termination rates are allowed to recover fixed and common costs is not technology neutral and creates distortions. It is also in breach of the EC Recommendation. Notwithstanding this, EE continues to believe that pure LRIC is not the right basis on which to set mobile call termination rates for the reasons recently argued in front of the CAT/CC[8] (which case is currently before the Court of Appeal[9]). If pure LRIC is applied to mobile call termination rates ultimately then EE considers it should also be applied to fixed termination rates to ensure technology neutrality.[10]

If it is assumed that the CAT judgment[11] on mobile call termination is upheld then EE makes the following observations in relation to fixed call termination markets.

- EE agree with the sentiment in paragraph 4.40 of the Call for Inputs that there has been no significant change in market conditions which would warrant a change in the SMP finding in relation to fixed call termination as defined in the 2009 Wholesale Review. Consumers still predominantly call a particular number and, in order to complete that call, the

[5] EE notes that Ofcom is currently considering the nature of cost orientation remedies more generally through Ofcom's cost orientation and regulatory financial reporting project (see Call for Inputs published on 8 November 2011 "Review of cost orientation and regulatory financial reporting in telecoms"). No consultation has yet been issued in relation to this which further increases the uncertainty of what this would mean in practice.
[6] This provides EE's answer to consultation question 23 especially.
[7] See "Everything Everywhere response to Ofcom wholesale mobile voice call termination", dated 23 June 2010.
[8] See CAT Cases 1180-1183/3/3/11. See the CC's final determination in the same cases of 9 February 2012. (http://www.competition-commission.org.uk/assets/competitioncommission/docs/appeals/telecommunications-price-control-appeals/final_determination.pdf)
[9] Case recently lodged. Permission to appeal given by order of the chairman of the CAT dated 6 June 2012; [2012] CAT 16
[10] EE's answer to consultation question 24.
[11] CAT judgment [2012] CAT 11 of 3 May 2012

originating CP still has no choice but to purchase call termination from the CP providing service to the customer with that number.[12]

- In this context, EE has no strong views on changing the basis of market definition from the **network** on which the call is terminated to one which is based on the individual CP's **number ranges**. Given that this market definition is now established for mobile call termination there may be consistency benefits to making this change. However, these benefits would need to be weighed against any additional costs for industry and Ofcom associated with the change. EE strongly considers that if this change is made then it needs to be sensitive to the underlying technology used. In relation to calls to mobile number ranges, Ofcom's guidance on the fair and reasonable charging SMP condition recognises this[13] and Ofcom's original proposals to allow any holder of a mobile number range to receive a mobile termination rate were of considerable concern to EE.[14] As a matter of principle, CPs should be regulated in line with their own efficient level of costs. If Ofcom moves to this new form of market definition for fixed networks it will need to consider what efficient cost benchmarks should be applied to which number ranges, in the same way as has occurred in relation to mobile number ranges.[15] The process of consulting upon and issuing guidelines on this, of CP negotiations on rates where there are variations depending on the terminating CP's efficient costs and of Ofcom resolving any disputes in this regard need to be considered.
- *A priori*, the current approach to modelling fixed operators' costs (as described in paragraph 6.12 of the Call for Inputs) would not be fit for purpose to set pure LRIC based fixed termination rates. Potentially, therefore, there is a need to develop a whole new cost model. EE is concerned that Ofcom has underestimated the difficulties in so doing. The development of cost models has historically been subject to a number of controversies. Ofcom appears to have planned[16] on allowing the same amount of time for developing such a model on the amount of time taken in the last mobile call termination market review. That is inappropriate as that modelling exercise involved updating an existing (and previously well discussed) model rather than the development of a new model. Further, introducing an NGN bottom-up model, which is one option canvassed in the Call for Inputs, would seem to raise potentially novel issues. At this stage EE does not have any specific views on the appropriateness or otherwise of using an NGN bottom-up model for some of all of the Network Charge Controls. EE's key observation in this regard is that the use or otherwise of such an approach should ensure a competitive neutral outcome. Further any such model will need to be robust (not based on assumptions about future technologies). This has always been a requirement Ofcom has applied to mobile LRIC cost models.[17]
- In relation to common cost recovery, EE urges Ofcom to be extremely careful about allowing recovery of such costs from other regulated charges in the circumstance where such costs are no longer recovered from call termination. Increases in BT's retail charges for basic telephony (followed by many of the network based competitors) suggest that there is not a significant impediment to these costs being recovered from competitive retail markets. Further, by necessity, recovery of fixed and common costs from other regulated

[12] This comprises EE's answer to consultation question 12.
[13] "Wholesale mobile call termination: guidance on dispute resolution in relation to fair and reasonable charges: Statement", published 5 April 2011.
[14] See section 5.3 of "Everything Everywhere response to Ofcom wholesale mobile voice call termination", dated 23 June 2010.
[15] This provides EE's answer to consultation question 11.
[16] In the basis of the limited information available to us in the UKCTA Presentation on this issue.
[17] Inter alia, this responds to consultation questions 25 and 26.

services would require estimates to be made on the volume of calls to be originated over the charge control period by competitive providers. Such estimates could well have an impact in themselves on competition. In deciding whether to take this approach Ofcom needs to consider the risks and benefits to competition of recovering or not recovering such costs from other regulated products, as well as the impact on those who receive fixed call termination revenue. If Ofcom does decide to take this approach, then the extent to which BT and other fixed termination providers receive additional revenue from other services must ensure that over-recovery of such common costs is not possible. This should not be a mechanism by which providers of fixed termination can recover the lost common costs solely from other competitors through regulated charges.[18]

- The issue of the speed at which fixed termination rates should be reduced to pure LRIC levels (the "glide path" imposed) can only be properly assessed in the light of actual cost estimates. Until these are available, EE cannot provide a detailed view on the appropriateness and feasibility of different glide paths. However, at a high level, EE sees no reason why pure LRIC rates cannot be reached very rapidly. In relation to mobile termination rates the CC essentially concluded that rates should be reduced to pure LRIC rates as soon as practicable after the date set by the EC Recommendation for achieving pure LRIC rates (the end of 2012). Given that this review will only conclude significantly after that date and that fixed operators have been expecting this change for some time (and will have had significant warning that it was coming), and that the absolute reductions in rates involved are of a different order of magnitude compared to those required from the mobile operators, there would seem to be little *a priori* justification for delaying such a change.[19]

In relation to the other issues raised in the Call for Inputs on fixed termination rates (the obligations to be placed on other CPs and whether a time of day gradient is maintained) EE does not have any further comments to those above on these issues in principle. EE reserves its position about the impact and practicalities of any more concrete proposals on these issues and will comment if appropriate in later consultations on the detail of these issues.

4 Non-geographic call termination

An important issue in relation to call termination which is <u>not raised at all</u> in the Call for Inputs is the position of non-geographic call termination. This is an area where EE considers there has been a material change since the 2009 market review. EE considers that there is no reason why non-geographic call termination should not now be included in the wider call termination markets (or should always have been considered to have been so included). As Ofcom is well aware, the lack of an SMP finding in this area has created significant wider issues for Ofcom, industry and ultimately consumers. EE does not believe that the reforms proposed by Ofcom in its Simplifying Non-Geographic Numbering review are likely to provide a panacea to those issues. Including non-geographic calls in the call termination markets covered by this market review would provide a sound basis for ensuring that a sensible, pragmatic and economically efficient approach can be reached with respect to such calls. EE is providing its more detailed views on the benefits of this approach in its response to "Simplifying Non-geographic numbers: detailed proposals on the unbundled tariff and freephone".[20] This response focuses on the reasons for (re)defining the relevant market in this way.

[18] EE's answer to consultation question 28.
[19] EE's answer to consultation question 29.
[20] Ofcom consultation, published 4 April 2012.

The starting point for all market reviews is the list of relevant markets susceptible to ex ante regulation, published in the Commission's Recommendation.[21] This refers to "call termination on individual public telephone networks at a fixed location". It therefore does not distinguish between geographic and non-geographic calls in the way in which Ofcom's current (and proposed) market definition does.[22] Ofcom's historic justification for excluding non-geographic numbers from the relevant market can be seen in "NTS call termination market review"[23]. Inter alia, Ofcom found at that time that NTS call termination was a single national market. In particular, it considered that it was not possible to distinguish between the then very popular Internet Service Provider (ISP) use of such numbers for dial-up internet services and other users. Effectively the sensitivity of such ISP wholesale customers to price changes (given that the charges for these calls effectively represented their entire business) protected other users of non-geographic numbers and made it appropriate to distinguish between non-geographic and geographic call termination.

This approach also appears to underlie the European Commission's comments on a 2005 decision of ARCEP, the French NRA, to find separate markets.[24] There the Commission noted that non-geographic numbers were not excluded *per se* from the call termination market in the recommendation but that proper analysis of the competitive conditions faced by independent service providers could lead to it being appropriate to find a separate non-geographic call termination market.

The Call for Inputs provides no indication that Ofcom is planning to undertake the requisite analysis on whether the competitive conditions in the market(s) for non-geographic call termination are sufficiently different to warrant different treatment from the markets for geographic call termination (e.g. no need for Ofcom regulatory intervention as no holders of SMP).. The issue is simply ignored. EE considers that this is not merely inappropriate, but in violation of Ofcom's obligations under the EU Common Regulatory Framework (CRF). Circumstances have clearly changed significantly since Ofcom (and indeed Oftel) last fully considered this issue.

It is no longer the case that there is a significant use of these numbers to provide dial up internet access which leads to a body of ISP purchasers who are very price sensitive to call termination rates. ISPs have now largely migrated their customer bases to broadband and therefore are far less sensitive to price changes in non-geographic call termination. The fact that the market for selling to service providers (i.e. hosting non-geographic numbers) may be competitive is irrelevant to whether or not Terminating CPs (TCPs) have market power in wholesale non-geographic call termination. There is a direct analogy here, for example, with the mobile retail market being competitive but a finding of SMP in the wholesale mobile call termination market. Once a service provider has chosen a hosting TCP, an originating CP whose customers wish to contact that service provider has no choice but to terminate calls with the hosting TCP – in exactly the same way as applies to geographic fixed call termination and mobile call termination.

Ofcom's proposals for unbundling the "call termination" element (service charge) from the "origination" access charge further strengthen the case for revisiting this issue in the current market review. Finding SMP in relation to non-geographic call termination would be a complement to Ofcom's proposals in relation to its Simplifying Non-geographic Number Review. The latter is

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[21] Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the European Council on a common regulatory framework for electronic communications networks and services (OJEC L344/45, 28/12/2007).

[22] See, for example, paragraph1.14 of the Call for Inputs.

[23] Ofcom consultation published 22 October 2004.

[24] See EC Comments pursuant to Article 7(3) of Directive 2002/21/EC on cases FR/2005/0227, FR/2005/0228, and FR/2005/0229 (SG-Greffe (2005) D/205049), dated 15 September 2005.

certainly not a substitute for such a finding as it is explicitly not a market review based on the same competition principles which apply under the Framework Directive.

We would accordingly urge Ofcom, whilst it is in any event about to commence a detailed information gathering process to support its fixed narrowband market review, to request and analyse the relevant data to ascertain whether there is (or is not) a need for it to intervene at the wholesale level in the markets for fixed termination of non-geographic calls in the UK, in line with Ofcom's obligations under the CRF.

5 Other issues

EE has the following further points in addition to the above which are raised by the Call for Inputs.

- S*ingle Transit:* EE has nothing further to add to the UKCTA response, which it supports, on this issue and agrees that the Single Transit market should continue to be regulated for the same reasons it is regulated currently.[25]
- *Requirement to notify changes to charges, terms and conditions:* similarly, EE agrees with the UKCTA response on this issue and believes there is benefit on addressing the asymmetric nature of current arrangements. EE also notes that the extent to which such asymmetries exist may be influenced by the outcome of the SIA Dispute currently before Ofcom and also refers Ofcom to its submissions on that dispute.[26] [27]
- *Carrier pre selection and indirect access:* Ofcom questions whether there is still a need for an obligation to provide CPS and IA in the Call for Inputs, especially given the growth in fully unbundled lines.[28] EE's view is that such a call origination remedy is still warranted in the wholesale call origination market where BT continues to have SMP (see section 2 above). Falling back on a general obligation to provide network access on reasonable request would not be appropriate here. There are a range of competitors who would be in a substantially weaker position without such a call origination remedy which would weaken competition overall. As noted above, retail competition broadly occurs on a national basis and therefore such competitors are not protected by the potential to purchase call origination from operators of fully unbundled lines and such operators would have no incentive to provide any services equivalent to CPS to competitors. Therefore, such competition continues to rely on the existence of such a call origination remedy and its removal would be detrimental to the long term interests of consumers. EE would also refer Ofcom to the UKCTA response on this issue.[29]
- *NTS Call Origination:* paragraph 5.20 of the Call for Inputs states Ofcom's intention to consider whether an NTS call origination obligation remains appropriate in light of the proposed changes discussed in the 2012 NGC Consultation. EE is providing its detailed comments in response to that consultation separately. At this stage, therefore, EE's only additional comment in this respect is that it seems highly likely that the implementation of any new arrangements for non-geographic call services is likely to occur significantly after the existing NTS call origination obligation will lapse under the this market review. Ofcom must ensure at the very least that appropriate interim arrangements are in place in order to avoid unnecessary uncertainty for CPs and disputes.

[25] EE's response to consultation question 14.
[26] Dispute relating to BT's Standard Interconnect Agreement ("SIA"), Case CW/01083/01/12, opened 14 February 2012.
[27] EE's response to consultation question 17.
[28] See paragraph 5.12-5.15 especially of the Call for Inputs.
[29] EE's answer to consultation question 18.

- *IP interconnection:* the Call for Inputs also raises the possibility that operators of TDM services will be required to provide interconnection on an IP basis (and also raises the possibility that CPs with NGNs would be able to charge a higher fixed termination rate to cover the costs of converting TDM calls to IP). Given the number of different protocols currently in use, EE considers that the relevant approach here on an interoperability, interconnect and charging basis will require further consideration in light of more specific proposals. EE will be happy to engage in future discussions on this issue and agrees this is a potential issue for this review to consider, but suggests that this requires further industry discussion or workshops with Ofcom before any firm views can be provided.